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IN THE

Supreme Court of the United States

No. [redacted]

October Term, 1963

1176

MORTIMER W. H. COX, Administrator
of the Estate of LEONA A. JACKSON,
Deceased,

Petitioner

v.

ARTHUR O. HECKER,

Respondent

MORTIMER W. H. COX, Administrator
of the Estate of LEONA A. JACKSON,
Deceased,

Petitioner

v.

ELEANORE R. WRIGHT, also known as
ELEANORE R. HECKER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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§ 332 (b)

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Supreme Court of the United States

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v.

ELEANORE R. WRIGHT, also known as ELEANORE R. HECKER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Justices of the Supreme Court of the United States:

MORTIMER W. H. COX, petitions the COURT for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit and says:

A. OPINIONS BELOW

The opinion of LUONGO, J., in the United States District Court for the Eastern District of Pennsylvania, is reported in 218 Fed. Supp. 749 (R* 67a). The opinion of McLAUGHLIN, GANEY and SMITH, JJ., in the United States Court of Appeals for the Third Circuit has not been reported (App.** A, p. 15).

B. JURISDICTION

The jurisdiction of this Court is invoked on the following grounds:

i. The date of the judgments of the United States Court of Appeals for the Third Circuit, sought to be reviewed, was April 10, 1964, and the time of the entry thereof was April 10, 1964. (App. B-16, 17.)

ii. The date of the order of the Court of Appeals denying a rehearing was May 5, 1964. (App. B-15.)

iii. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is the Act of June 25, 1948, Ch. 646 §1; 62 Stat. 928; 28 USC §1254: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

C. STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Whether petitioner was deprived of due process, equal protection of the law or right to trial by jury:

---

* R herein refers to petitioner's Appendix in the Court of Appeals.

** App. here refers to the Appendix to this petition.

i. By the application of the decisional rule that expert testimony was necessary to show negligence of defendant doctors in their professional acts, including supervision of unlicensed subordinates who, in violation of the Pennsylvania Dangerous Drug Act of 1955 and of the Federal Drug, Device and Cosmetic Act, prescribed for Mrs. Jackson a drug which was, by operation of the statutes, classified as a dangerous drug and which was administered to her under such prescriptions.

ii. By the Trial Judge's exclusion of petitioner's counsel here (who, as surviving husband of Mrs. Jackson, was in a sense a real party in interest) from consulting with and guiding succeeding trial counsel in the trial of the cases (R 137-8a, l.26).

iii. By the District Court's refusal of sufficient time for succeeding counsel to prepare after an aborted first trial (R 59a, l. 26).

iv. By the Trial Judge's undue stress on the case for the defense (R 36a-47a) and errors in the charge.

v. By the Trial Judge's refusal of petitioner's requests for charge (R 23-35a).

vi. By defense counsel's reading, in summation, from a book not in evidence (R 166a, l. 11).

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

Article III, Section 2 (App. C-18).

Fifth Amendment (App. C-18).

Seventh Amendment (App. C-18).

Fourteenth Amendment (App. C-18).

Federal Acts

Drug, Device and Cosmetic Act of October 26, 1951, 65 Stat. 648; 21 USC §321 et al. (App. C-19).

Act of May 9, 1941, Ch. 97; 55 Stat. 184; 5 USC 623 d (App. C-20).

Act of June 25, 1948, Ch. 646, §1; 62 Stat. 928; 28 USC §1254 (App. C-19).

Pennsylvania Acts

The Medical Practice Act, June 3, 1911, PL 639, 63 Purd. Stat. §401a (App. C-23).

The Dangerous Drug Act of 1955, Dec. 28, 1955, PL 913 (not in digest because later amended) (App. C-20).

Act of Apr. 6, 1951, PL 68; 28 Purd. Stat. §110 (App. C-21).

Act of Jun. 12, 1951, PL 533; 50 Purd. Stat. 1072 (App. C-21).

Act of Dec. 14, 1955, PL 853 (App. C-22; ~~C-1~~); (No. 255).

E. STATEMENT OF THE CASES

Two actions in trespass were instituted by petitioner, as guardian (later substituted as administrator), against respondent Doctors Hecker and (Wright) Hecker, respectively superintendent and medical director of Embreeville (Pa.) State Hospital, for permanent brain damage to his ward allegedly caused by chlorpromazine (trade name thorazine, here called CPZ), a drug administered to her (Exh. P-1-E; R·16a) on prescriptions of three unlicensed subordinates of respondents (Exh. P-1-C, R 7-9a; Exh. P-3,

19a), in violation of the Dangerous Drug Act of 1955 (Pa.) which, by reference to the Federal Drug, Device and Cosmetic Act, and through official action under the latter, classified the drug as "dangerous", and limited prescription of it to Pennsylvania licensed doctors (Exh. P-2, p. 15b—Resp. Supp. App.). The Federal act also limited prescription to licensed doctors. Two of the subordinates [(Mainero) deSchut and deSchut] were not licensed anywhere (R 19a); (Mainero) deSchut prescribed even after expiration of her student-training period (R 7a, July 11, 13, 22, R 19a); one of the subordinates (Holt) was licensed, but not in Pennsylvania (R 19a). The cases were tried together to a jury in February, 1963, after mistrial in December, 1962. Verdicts and judgments for both respondents resulted, new trials were refused, the Court of Appeals affirmed (App. B-16, 17), and rehearings were refused (App. B-15).

The causes were companion cases, tried together in the District Court, argued together in the Court of Appeals and involved, in some parts identical, and in all parts closely related, questions.

Mrs. Jackson was poisoned by over-administration of CPZ in Embreeville State Hospital (135a, l. 7; 141a, l. 19 et seq.; 142a, 147a, 148a, 149a, l. 26). For about five years before Embreeville, at times she manifested mild delusions. She was not incapacitated; was well oriented otherwise and in general carried on much as a normal person. She had been mildly diabetic since the fall of 1954 (R 74-80a, 117a, l. 13; 128a, l. 25).

Because of some lack of judgment (R 79a, l. 4), her husband on April 26, 1957, took her to Embreeville to stay until he could find a companion to be with her (R 80a, l. 29). Administration of CPZ, a drug often attended by well-known highly individualized adverse reactions (R 111a, l. 22; 114a, l. 25; 150a, l. 24) began on May 6, 1957 (Exh. P-1-E, R 16a). In May, CPZ produced an intense skin rash, suffusing face, neck, chest, arms and legs (R 83a,

l. 27, Exh. P-8, R 21a, the only then "present" medication being CPZ, Exh. P-1-E, R 16a), nurses' notes (Exh. P-1-D, R 10-15a) show untidiness, central depression of the central nervous system, polyuria, incontinence, parkinsonianism and toxicity, all recognized effects of the drug. Confusion began in late May and progressed to July 19 (R 83-84a) when the drug had produced great restlessness and complete confusion, staring and glassy eyes, rigid limbs, tremors, she could utter only monosyllables forced by grunting with apparently great difficulty, had difficulty in swallowing and walking—the latter with a lunging gait, her body arched forward (R 84-86a, 128a last 4 lines, 129a first 21 lines, 141a). A swift, radical, complete change of personality had resulted (R 129a, l. 1 to 21; 104a, l. 17); the drug continued to July 23, inclusive (Exh. P-1-E, R 16a).

She was never confused before except for brief periods following, and caused by, electro-convulsive "treatments" in 1953 and 1956 (R 112a, 154a first 9 lines). On July 26 Mrs. Jackson's husband took his wife to Dr. Wright and consulted her about the condition (R 86-89a) and on August 2 saw Dr. Hecker about Mrs. Jackson (R 90-5a), but the drug was resumed, intramuscularly (a more potently operating method of administration) on August 1 and went on for six more days until her husband removed her from the hospital on August 7, 1957 (R 95a, l. 29). Dr. Hecker refused on August 2 to do anything about her (R 94-5a, 114a). Total drug administration was 85 days, 300 mg. a day for most of the period. Noludar, another dangerous drug, was also administered for part of the time (P-1-E, R 16a).

The parkinson-like syndrome abated largely by late October, 1957, but hopeless confusion and body and leg jerks, not present before the drug, continued 4½ years to her death on December 28, 1961 (R 97a, l. 27-9; 101-2a). Bereft of her mind, she was never again able to carry on in the nearly normal way she did before the drug (R 99a,

101a, 104a, 118a). The diabetes was under good control to her death (R 134a, l. 12).

Dr. Hecker, as superintendent, had the duty to receive and care for Mrs. Jackson (App. C-21, 22, 23). Dr. Wright was in charge of the three subordinates and Mrs. Jackson (R 158a). In July and August, 1957, both respondents charged the confusion to diabetes (R 87a, 89a, 94a, 108a, 116a); diabetes did not cause the confusion because there was no acetone in the blood or urine, (a prerequisite to diabetic acidosis), prior to July 25, 1957, (R 131a, 133a bottom half, Exh. P-1-B, R 5-6a; Exh. P-1-D, R 10-15a); there was a minimal trace of acetone on a few occasions after July 25, but insufficient to produce confusion. No insulin was administered at the hospital until July 11, 2½ months after entrance, and at no time in Mrs. Jackson's stay there was more than a minimal amount of insulin given (R 132a, l. 17, Exh. P-1-E, R 16a, P-1-D, R 12-15a). CPZ was stopped on July 23 (Exh. P-1-E, R 16a) but Dr. Wright directed on July 26, *three days after the drug had been stopped*, "Cut Thorazine" [stop the drug] (Exh. P-1-C, R 8a).

Drs. Stahlnecker and Staples, who, respectively, had examined Mrs. Jackson on July 26 and 31, 1957, while she was still in Embreeville, testified for petitioner, stating there was overdosage and that confusion on those dates was due to the drug, but absolved the drug as a substantial contributing cause of the *permanent* confusion in Mrs. Jackson, although they had stated to her husband in preparation for trial that it was (affidavits in support of motions for new trials, R 61-65a). Dr. Winkelman, who had examined Mrs. Jackson shortly after her removal from Embreeville, stated in preparation that the drug had caused hypotension—dilation of arteries—(a well-known effect of the drug)—reducing or stopping blood, and consequently oxygen supply, to the brain, as a result of which the brain was damaged, but refused to appear as a witness in the cause, saying, "I would not want to do anything which would make me a social out-

cast." (R 63-4a). Dr. Gottlieb, an *allergy specialist* and instructor in allergy in the University of Pennsylvania Medical School, refused to testify because he "did not know much about the drug" (R 66a).

G. BASIS FOR FEDERAL JURISDICTION

Diversity of citizenship is the basis for jurisdiction in the District Court; petitioner was and is a citizen of New Jersey and respondents were and are citizens of the Commonwealth of Pennsylvania.

The Federal Constitution, Article III, Section 2:

> "The judicial power shall extend . . . to Controversies . . . between Citizens of different States. . . ."

H. ARGUMENT AMPLIFYING REASONS RELIED ON FOR WRIT

i. Application and Operation of Unconstitutional Decisional Rule.

Except where circumstances are said to be within the common understanding of lay persons, Pennsylvania, like most other states, by decisional rule purportedly requires expert testimony to establish a doctor's negligence in his professional acts or non-acts, including supervision of subordinates. In a practical way this means that a plaintiff cannot succeed without testimony of another *doctor*, because it is a practical impossibility to find and produce a lay expert; even if one found a lay expert, a judge would probably say, "No medical degree, no medical expert; objection sustained." So, plaintiff must lose, for, also in a practical way, it is an impossibility to find a doctor who will testify against another doctor. Contrary instances are so infinitesimal in number as to be dismissed as rare mutations.

Every judge and every lawyer knows this. See blistering attacks by Carroll, P. J. (Common Pleas, Philadelphia)

and Justice Musmanno, in *Demchuk v. Bralow*, 404 Pa. 100, 106, 170 A. 2d 868, 871.

Present counsel for petitioner, preparing for trial, talked with Drs. Stahlnecker and Staples, the former a long time family doctor, the latter who had at times between 1952 and 1957 treated Mrs. Jackson; each gave his opinion that CPZ was a substantially contributing cause of brain damage (Affidavit in support of motion for new trial, R 61-5a; in Pennsylvania there may be more than one proximate cause). Relying on these opinions and in an effort to comply with the expert rule, counsel subpoenaed both doctors. Both absolved the drug as a cause of permanent injury (R 137a, l. 19, 155a, l. 11-19) and Stahlnecker denied what he had told me (R 138a). The case was hopelessly lost. Pursuing the effort to discredit Stahlnecker could only have negatived his denial; it would not have been affirmative evidence of cause. Discrediting Staples would have done no more.

This constitutional question could not have acutely arisen in any way other than as it did, for there is now concrete proof on the record in this very case of the impossibility of the rule.

Suggesting one's own veracity may be ungenteel, but some indication of the truth of the affidavits may lie in the fact that a lawyer would have to be an imbecile to put a doctor on the stand without having had the latter's prior support of the claim of injury, cause and negligence. Winkelman (who could not have been compelled to testify as an expert) sums up the rationale of this whole iniquitous practice in his protest that he would not want to do anything which would make him a social outcast (R 63-4a). All three of them knew what the drug had done to Mrs. Jackson.

Necessarily postulating that a plaintiff cannot succeed against a doctor, we perforce conclude that the rule is unconstitutional, for application of it presupposes availability of unavailable evidence. Placing so heavy a burden on the remedy as to make it totally unavailing is a denial of due

process: *New York Times v. Sullivan*, U. S. , 84 S. Ct. 710; this applies to operation of a decisional rule: *CB&Q v. Chicago*, 166 U.S. 226, 17 S. Ct., 581, 582; *1621 Inc. v. Wilson*, 402 Pa. 94, 103, 166 A. 2d 271, 275; *Tribune Co. v. Thomas*, 120 Fed. Supp. 362, 369.

The state says in effect: Injury from a doctor's negligence is a wrong. For every wrong we supply a remedy—a right of action to attempt to prove the wrong. But we will let you succeed only if you produce evidence of a certain type, which we know in advance is unavailable. Hence in actuality, you may not avail yourself of the remedy which due process requires. Absent substantial remedy for what the law says is a wrong (Pennsylvania recognizes the right of action), due process is wanting. Regard must be had to substance and not form: *CB&Q*, supra. A right of action, *once accrued*, is a property right which the state may not take away without provision of another adequate remedy: *Wilkes Barre v. Mundy*, 18 Fed. Supp. 65. The Fourteenth Amendment preserves the right to redress by some effective procedure: *Gibbes v. Zimmerman*, 290 U.S. 326, 54 S. Ct. 140, 142.

It is time to see in this situation, reality, the supposedly constant aim of the law, just as this Court did in the Segregation Cases, in Gideon and Wainwright and Thompson and Louisville. All 190,000,000 people in this country are potential, many are actual, victims of enforcement of this rule in favor of about 240,000 doctors.

Criticism of the case recently decided by this Court is not suggested, but it seems doubtful that greater injustice will be averted by preventing interrogators from addressing witnesses by given names than would be by striking down this unrealistic legalism. The impossibility of the rule demands that we be permitted to go to a jury without being demolished in advance by a rule based on a fiction—by law which metes out justice—by law which looks through appearance to discern reality.

It appears that this question has not been settled by this Court; it should be because of its actual and potential serious impact on every person in this country.

ii & iii. EXCLUSION OF COUNSEL AND LACK OF TIME.

Exclusion of counsel, in substance a real party in interest, from aiding succeeding counsel, the latter pushed by the defense into trial before he could adequately study the voluminous material vital to the case, was a denial of due process (R 137-8a). This was the equivalent of putting a party out of the courtroom in the trial of his own case; presence, without leave to consult and guide, is the equivalent of absence. See: *Arrington v. Robertson*, 114 F. 2d 821, 823; 53 Am. Jur. 42, §24. One disastrous result was the improvident withdrawal of the record of Philadelphia Psychiatric Hospital, vital as showing the unending confusion there, 4½ months after it began (P-9, R 159a).

iv. THE CHARGE WAS A DENIAL OF DUE PROCESS.

In a score or more instances, every item of evidence favorable to defense was stated as *fact*, not as matters which the jury *might find* as fact, or to which someone testified. Not a single item of petitioner's evidence, favorable to his case, was stated *either as fact or otherwise* except that "you have heard of the *possible* side effects the use of the drug *may* have had." "You have heard that the use of the drug *may* have caused toxic confusion." Yet these were testified to as *facts*, not *mere possibilities*. The charge was one-sided in the extreme, so much so that the damage was irremediable, the Judge cautioning the jury over and over, not merely stating his opinion, but in terms plainly indicating that they could not properly find for petitioner. Still, defense testimony was but 31 pages out of a record of 507 pages. My testimony, none of it denied, comprised 169 pages yet he made no reference to a single

word of it. Obviously the charge was a clear departure from the fair course of a trial. He told the jury to pass on the qualifications of the subordinates, to determine whether treatment fell below the proper standard, referred to programs for subordinate trainees, stated that expert testimony was necessary, that respondents were liable only for their own conduct, that the non-licensed status did not establish incompetence. Once he told the jury that deSchuts were licensed, once that they were not, and once to determine whether approval for training was the equivalent of a license! All were completely immaterial and highly prejudicial in view of the express terms of Federal and State statutes, forbidding prescription by a non-licensee.

v. REFUSAL TO CHARGE.

The trial judge refused many proper charge requests of petitioner (R 23-35a).

vi. FUNDAMENTAL ERROR.

Fundamental error was committed by defense counsel's reading from a book on CPZ; this was highly prejudicial and irremediable for it had the effect of apparently contradicting the confusion produced by the drug by showing that other persons had taken greater doses of the drug without ill effects. (R 166a, l. 11). The effect of the printed word on lay persons is common knowledge.

vii. GENERAL.

Compression of this petition to try to keep within the rule leaves little space for other important aspects of the case. Causation, injury and negligence were shown. Liability flowed, as to Hecker, from his statutory duty of care and to appoint subordinates (App. C-23), his failure, as head administrator, properly to supervise, permitting the drug to continue after knowledge of Mrs. Jackson's condi-

tion (R. 95a; App. 21, 22); as to Wright, from her like lack of supervision and her knowledge of the allergy, a sure danger signal, almost two months before the radical parkinsonianism and utter confusion (Exh. P-8, R 21a); as to both, from allowing incompetents to handle a dangerous agency (Restatement, Torts §308; *Anderson v. Bushong*, 404 Pa. 382, 386-91, 177 A. 2d 771, 773), and from allowing unlicensed persons to prescribe the drug in direct violation of the Dangerous Drug Act, which, given injury, was, without other proof, — negligence per se: *Jinks v. Currie*, 324 Pa. 532, 537, 188 A. 356, 358; Restatement, Torts §286. Nor, as a matter of law could there be any standard for one statutorily declared (unlicensed) to be incompetent (Exh. P-3, R 19a).

So it will not be thought that the medical practice act of 1911 allowed these incompetents to prescribe: The Dangerous Drug Act of 1955, *specific* in its requirement that *only a Pennsylvania licensed doctor might lawfully prescribe a dangerous drug* [*CPZ*], necessarily takes precedence over the *general* act passed 44 years before and, prior to 1957, last pertinently amended in 1941.

Any supposed immunity of public employees from liability for acts of subordinates is unavailing *where the superior cooperates in the wrong by lack of supervision*, e. g. by allowing legally incompetents to prescribe, in violation of law, a drug limited by the federal act to dispensing on the prescription of a licensed practitioner (Cert. of Secretary of Dept. of Health, Education and Welfare, Exh. P-2, 15b, Resp. Supp. App., ~~App. 20~~); admitted without objection. See *Dowler v. Johnson*, 225 N.Y. 39, 121 N.E. 487, by Judge Cardozo quoted in approval in *Orris v. Roberts*, 392 Pa. 572, 578, 141 A. 2d 393, 396. See also 43 Am. Jur. 89, §§279, 281.

Erroneous instructions having been given, even if the jury might have concluded that cause, injury or fault was or were not shown, no one can say what they might have found on proper instructions.

It is respectfully submitted that the Courts below have grievously departed from basic principles of elemental justice as enunciated by this Court.

WHEREFORE petitioner prays that certiorari issue herein.

ROBERT F. JACKSON
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,581
No. 14,582

Opinion Of The Court

(Filed April 10, 1964)

PER CURIAM.

Though these appeals were argued zealously and exhaustively on behalf of the appellant, our own study of the record convinces us that the trial judge dealt with all of appellant's contentions without any substantial error and most fairly.

The judgments of the district court will be affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,581
No. 14,582

Sur Petition For Rehearing

The petition for rehearing filed by Robert F. Jackson, Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court:

Dated: May 5, 1964

McLAUGHLIN
Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,581

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of February 11, 1963 of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk

April 10, 1964.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,582

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of February 11, 1963 of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
Clerk

April 10, 1964.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 26,209
(14,581)

Judgment

Before LUONGO, *J.*

AND NOW, to wit: February 11th, 1963, in accordance with the Verdict, it is ORDERED that Judgment be and is hereby entered in favor of Defendant, Arthur O. Hecker, and against Plaintiff, Mortimer W. H. Cox, Administrator of the Estate of Leona A. Jackson, Deceased, with costs.

By THE COURT:

Attest:

R. J. GREENWOOD,
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 26,210
(14,582)

Judgment

Before LUONGO, *J.*

AND NOW, to wit: February 11th, 1963, in accord-

ance with the Verdict, it is ORDERED that Judgment be and is hereby entered in favor of Defendant, Eleanor R. Hecker, also known as Eleanor R. Wright, and against the Plaintiff, Mortimer W. H. Cox, Administrator of the Estate of Leona A. Jackson, Deceased, with costs.

By THE COURT:

Attest:

R. J. GREENWOOD,
Deputy Clerk

APPENDIX C

Constitutional and Statutory Provisions and Statutes Involved

The Constitutional and statutory provisions in force at the time here concerned which the cases involve are as follows:

UNITED STATES CONSTITUTION

Article III §2

"The judicial power shall extend . . . to Controversies . . . between Citizens of different States. . . ."

Fifth Amendment:

"No person . . . shall be deprived of . . . property without due process of law; . . ."

Seventh Amendment:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

Fourteenth Amendment:

"Section 1 . . . nor shall any State deprive any person of . . . property, without due process of law; . . ."

STATUTES:

Federal

Act of June 25, 1948, Ch. 646 §1; 62 Stat. 928; 28 USC §1254

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

Drug, Device and Cosmetic Act (Oct. 26, 1951, §1; 65 Stat. 648; 21 USC §321 and §353)

"§321. . . .

For the purpose of this chapter—

* * * * * * *

(g) The term 'drug' means (1) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; . . ."

"§353. . . .

* * * * * *

(1) A drug intended for use by man which—

* * * * * *

(B) Because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or

(C) is limited by an effective application under section 355 of this title to use under the professional super-

vision of a practitioner licensed by law to administer such drug, shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

* * * * *"

The Federal Act of May 9, 1941, Ch. 97; 55 Stat. 184; 5 USC §623d:

"§623d. Seal.

. . . Copies of any books, records, papers, or other documents in the Department of Health, Education, and Welfare shall be admitted in evidence equally with the originals thereof when authenticated under such seal. . . ."

Pennsylvania

Dangerous Drug Act of December 28, 1955, Pamphlet Laws 913; [not in any digest in its form in effect at the time here material because it was since amended]:

"Section 2. As used in this act:

(1) 'Dangerous drug' means a drug intended for use by man: which . . .

(b) because of its toxicity or other potentiality for harmful effect or the method of its use or the collateral measures necessary to its use, is not safe for use, except under the supervision of a practitioner, licensed by law, administer or prescribe such drug; or

(c) is limited by the Federal Food, Drug and Cosmetic Act to use under the professional supervision of a practitioner, licensed by law, to administer or prescribe such drug, . . .

(2) 'Prescription' means a written order and, in cases of emergency, a telephonic order for a dangerous drug, issued by a physician, dentist or veterinarian, duly licensed to practice in this State, in good faith, in the course of his professional practice, ...

* * * * *

Section 5. No dangerous drug shall be sold at retail or dispensed to any person, except under the prescription of a duly licensed physician, ...

* * * * *"

Act of April 6, 1951, §1, Pamphlet Laws 68; 28 Purd. Stat. §110:

"§110. Licensure or non-licensure status

The certification of a duly authorized representative of any administrative department, board or commission, attesting to the licensure status or non-licensure status of an individual, as shown by the required official records, shall be received as evidence in all courts in this Commonwealth in the trial of any case."

Act of June 12, 1951, (P.L. 533, art. I, §102; 50 PS §1072 et seq.) as last pertinently amended Jan. 14, 1952 (P.L. 2053, §1.)

"§1072. Definitions

As used in this act, unless the context clearly indicates otherwise, the following words and phrases shall have the following meanings:

(1) 'Care' shall include reception, detention, transfer, leave of absence, discharge, custody, care, ..."

(8) 'Institution' shall mean any State or licensed place, public or private, for the care of patients. The term shall include 'mental hospital', . . . (15) 'Superintendent' shall mean the physician in charge of the administration of an institution, . . .

* * * * *

"§1091. Places for the care of patients

(a) In this Commonwealth patients shall be cared for

(1) In the following institutions: . . . Embreeville State Hospital

"§1136. Qualifications, etc., of superintendents

The superintendent of every State institution shall be a physician with at least seven years training or experience, or both, in the care of patients.

"§1181. Admission by superintendent on application of relative, etc., and physician's certificate

(a) Application for admission as a patient may be made in the interest of—(1) Any person who appears to be mentally ill or in such condition as to need the care required by persons who are mentally ill, to the superintendent of any mental hospital; . . . (f) On receipt of an application and certificate, the superintendent may receive and detain the person sought to be admitted as a patient.

* * * *"

Act of April 9, 1929, P.L. 177, as amended by §6 of the Act of Dec. 14, 1955, P.L. 853 (No. 255) (Not in Purd. Stat. because later amended)

"Section 6. The act . . . is amended by adding, after section 2313, three new sections to read:

Section 2313.1. Commissioner of Mental Health. —The Secretary of Welfare shall appoint, with the approval of the Governor, a Deputy Secretary who shall have the title of Commissioner of Mental Health and who shall be a psychiatrist with at least seven years' training and experience in the care of patients. The commissioner of Mental Health shall . . . recommend to the Secretary of Welfare the appointment of the superintendents of state mental institutions who in turn shall assign, appoint and dismiss personnel of the institutions. . . ."

Medical Practice Act of 1911, June 3, 1911, Pamphlet Laws 639 §2 as amended; 63 Purd. Stat. §§401a, 409

"§401a. It shall not be lawful for any person in the State of Pennsylvania to engage in the practice of medicine and surgery . . . excepting those hereinafter exempted, unless he or she has first fulfilled the requirements of this act and has received a certificate of licensure from the board, which license shall be properly recorded in the office of the Superintendent of Public Instruction at Harrisburg. . . .

* * * *

"§409 (a) All persons who have complied with the requirements of the rules and regulations of the board, . . . shall receive from the Department of Public Instruction, acting for the said board a licensing certificate entitling them to the right to practice medicine and surgery, . . .: Provided, That this section relating to certificates to practice medicine and surgery, shall not apply to . . . any one while actually serving as a student intern under the supervision of the medical or surgical staff in any legally incorporated hospital or State hospital: . . .

Restatement, Torts

§302: "A negligent act may be one which: (b) creates a situation which involves an unreasonable risk to

another because of the expectable action of the other, a third person, an animal or a force of nature."

§308: "It is negilegence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others."

"§286 The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if: (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect; and, (c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and, (d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action."

§ 320

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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 146

MORTIMER W. H. COX, Administrator of the Estate of LEONA A. JACKSON, Deceased,
Petitioner,

v.

ARTHUR O. HECKER,
Respondent.

MORTIMER W. H. COX, Administrator of the Estate of LEONA A. JACKSON, Deceased,
Petitioner,

v.

ELEANORE R. WRIGHT, also known as ELEANORE R. HECKER,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1178.

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Petitioner,

v.

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Respondent.

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Petitioner,

v.

ELEANORE R. WRIGHT, ALSO KNOWN AS ELEANORE R. HECKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of LUONGO, J., in the United States District Court for the Eastern District of Pennsylvania is reported at 218 F. Supp. 749. The opinion of MCLAUGHLIN, GANEY and SMITH, JJ., in the United States Court of Appeals for the Third Circuit has not yet been reported (see Appendix A, p. 15 Petition and Appendix).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

Whether the well established and universally accepted decisional rule requiring expert testimony to establish negligence of defendant doctors in their professional acts, by its application, deprived Petitioner of due process or equal protection of the law.

Whether the admonition to Mr. Jackson, who at the time was neither a party of record nor counsel of record for the Petitioner, to allow able counsel of record to proceed with the trial of the matter without continuous and unnecessary delays, is a deprivation of Petitioner's right to trial by jury.

STATUTES INVOLVED.

The pertinent provisions of the applicable Federal and State statutes are listed at page 4 of the Petition and quoted at length in Appendix C to the Petition, pages 19-24.

STATEMENT.

Two actions in Trespass were instituted by Petitioner as guardian (later substituted as administrator) of Leona A. Jackson, deceased, against Respondent Doctors, Hecker and Wright for alleged permanent brain damage allegedly caused by the administration of the drug chlorpromazine administered to Mrs. Jackson during an admission to the Embreeville State Hospital in 1957.

Respondent, Arthur O. Hecker, M. D., was and is the superintendent at the Embreeville State Hospital (6b). Respondent, Eleanore Wright, M. D., the wife of Arthur O. Hecker, was and is the clinical director of the same hospital (157a, 7b). In these capacities, they are state officers and employees compensated solely by a salary (6b, 7b). No medical fee of any kind was charged by the Respondents to any patient at the hospital (6b). Embreeville State Hospital is maintained in large part by the Commonwealth of Pennsylvania and is devoted exclusively to the care of patients suffering from mental diseases.

The claim in this case is based on events which occurred during an admission of Petitioner's decedent to the Embreeville State Hospital upon application by her husband, Mr. R. F. Jackson, on April 26, 1957 (74a, 2b, 3b). Prior to that time, decedent had a history of mental and physical ills dating back to the early 1940's when Mrs. Jackson was subject to periodic attacks of a state resembling catalepsis (1b, 2b). In 1952 she began to have delusions (1b), which bothered her in spells of varying severity up to her admission to Embreeville in 1957 (1b, 5b). In 1953 she had been admitted to Embreeville for approximately five months for treatment of delusions and hallucinations (2b). Mrs. Jackson had been on a diet restricting her caloric intake to control her diabetes since the fall of 1954 (3b, 4b). Control of her diabetes was difficult because she continually refused to cooperate (3b, 4b, 127a), and her

manifestations of delusional thinking gradually increased (105a, 106a). In the fall of 1955 and spring of 1956, she was treated for delusions at the Institute of the Pennsylvania Hospital with chlorpromazine (3b). She was confined to the Philadelphia Psychiatric Hospital for five weeks in 1956 (4b). In the spring of 1957, prior to her admission to Embreeville, her diabetes was difficult to control because of her refusal to follow her diet and also because of hallucinations and periods of overactivity and agitated behavior (127a).

Mrs. Jackson had arteriosclerosis, combined with diabetes and schizophrenia (139a). Arteriosclerosis could have been synergistic with diabetes in producing neurological damage, and her brain was affected (5b, 6b, 139a). She needed supervision; she could not take care of herself; her communication was on a very superficial level; and her behavior was irrational (4b, 5b, 139a, 140a).

As a patient at the Embreeville State Hospital, Mrs. Jackson was under the care and supervision of Dr. James Harris, who was at that time director of the female service at that hospital (9b). Drs. Lydia Mainero, Luis deSchut and John P. Holt were residents under his direct and immediate supervision (9b, 6a, 7a, 8a, 9a). Shortly after Mrs. Jackson was admitted to the Embreeville State Hospital, her case was discussed at a staff conference, and Dr. Harris recommended that an ataraxic drug such as chlorpromazine be used to facilitate the control of the patient's diabetes and also recommended psychotherapy (9b). Drs. Luis deSchut and Lydia Mainero thereafter ordered a routine dosage of chlorpromazine to be administered to her (7b). The patient sometime later exhibited signs of a Parkinson-like syndrome, a common and expected side effect of the drug. This side effect was purely temporary in nature and had largely cleared by August 30, 1957 (130a, 137a).

After leaving the Embreeville State Hospital on August 7, 1957, the patient was admitted to the Philadelphia

Psychiatric Hospital with condition diagnosed by her physician, Dr. Staples, as a combination of schizophrenia and cerebral arteriosclerosis (388) which, combined with her diabetes, caused a continuous deterioration in the patient. This deterioration had commenced prior to her entry to Embreeville State Hospital in 1957 and continued until her death in 1962 (146a, 155a). There is no claim in this case that there is any connection between the administration of chlorpromazine to Mrs. Jackson and her death.

The separate cases against Dr. Hecker and Dr. Wright came to trial together in December of 1962. Mr. Robert F. Jackson, surviving husband of the decedent and a member of the bar of the District Court of the Eastern District of Pennsylvania, sat at counsel table and constantly consulted with plaintiff's counsel. After two days of trial before Judge Luongo and a jury, Mr. Jackson, who had appeared to be in constant conflict with his then trial counsel over the manner in which plaintiff's case was being tried, requested the trial judge to declare a mistrial to enable him to retain other trial counsel. Because of the apparent strain of the situation upon trial counsel and because of the joinder in the Motion by plaintiff's trial counsel, Mr. Jackson's request was granted with the express understanding that the case would be reset for trial in January (70a). Subsequently, plaintiff made application for further continuance, but this application was refused by the Calendar Judge, and the two cases were tried together again before Judge Luongo and jury in February, 1963.

At this second attempt to try the cases plaintiff's two medical witnesses, who were called as experts as well as treating physicians, testified that there may have been overdosage of the drug and that confusion at one point resulted from the administration of chlorpromazine. Temporary confusion was recognized by plaintiff's experts as an anticipated side effect of the drug, and they absolved chlorpromazine as a contributing cause of any permanent confusion in Mrs. Jackson. One of the plaintiff's experts,

Dr. C. S. Stahlnecker, testified affirmatively that he had never stated that chlorpromazine caused Mrs. Jackson's condition, although Mr. Jackson had at every conference tried to make him say it (quoted in Brief for Appellees at p. 16—N. T. 347). Following a trial of five days, the jury returned verdicts in favor of both defendants. Judgments were entered and plaintiff's Motions for a new trial in each case were denied. On appeal to the Court of Appeals for the Third Circuit, the Judgements were affirmed and plaintiff's requests for rehearings were denied.

ARGUMENT.

I. The Decision Below Is Clearly Correct.

Plaintiff's contention at trial was that Mrs. Jackson suffered permanent injury following treatment with chlorpromazine. Plaintiff's medical witnesses simply could not support this contention. There is not a scintilla of evidence that Drs. Hecker or Wright or any of the treating physicians were guilty of malpractice.

Petitioner contends that Drs. Mainero and deSchut, the medical residents, did not have licenses to practice medicine in Pennsylvania. As was correctly pointed out by Judge Luongo in his opinion, a reading of the entire statute indicates that its purpose is to protect the misinformed from the hazards of mislabeling, misbranding and adulteration. It is significant that Petitioner did not offer any testimony to show that there was any deficiency in the medical training or competency of Drs. Mainero and deSchut and Holt, or that they were medically unqualified to order drugs. Petitioner does not dispute that Drs. Mainero and deSchut were graduates of an accredited medical school, that they had completed an internship, and that they were qualified in all respects to practice medicine in their own countries (72a, 10b).

Petitioner's Exhibit P-3 (19a), a letter from the Secretary of the State Board of Licensure stated that Drs. Mainero and deSchut ". . . have never been licensed to practice medicine in Pennsylvania but were granted approval by the State Board of Medical Education and Licensure for residency training in Psychiatry at the Embreeville State Hospital . . ."

No evidence was offered to attempt to show any inadequacy in their knowledge of the proper uses of the drug chlorpromazine and its anticipated side effects. The contention is solely that no license was issued to the residents

by the Commonwealth of Pennsylvania and that, therefore, Respondents Hecker and Wright are guilt of negligence as a matter of law. Petitioner's contention wholly ignores the matter of causation. It is submitted that this contention is completely untenable. Even so, Judge Luongo submitted this very issue to the jury and it was resolved in Respondents' favor.

Although Petitioner refers to chlorpromazine as a dangerous drug, there is no evidence that it *is* a dangerous drug within the meaning of the Pennsylvania and Federal Drug Acts. The Pennsylvania Dangerous Drug Act of 1955, P. L. 913, defines "dangerous drug" as follows:

> "(1) 'Dangerous drug' means a drug intended for use by man which:
>
> (a) contains any quantity of [certain drugs not in evidence in this case] or any . . . derivative thereof, which derivative has been by the Secretary of Health, after investigation . . . found to be and by regulations designated as a dangerous drug; or
>
> (b) because of its toxicity or other potentiality for harmful effect or the method of its use or the collateral measures necessary to its use, is not safe for use, except under the supervision of a practitioner, licensed by law, to administer or prescribe such drug; or
>
> (c) is limited by the Federal Food Drug and Cosmetic Act to use under the professional supervision of a practitioner, licensed by law, to administer or prescribe such drug, but shall not include any drug the sale or dispensing of which is regulated by the act of July eleven, one thousand nine hundred seventeen (Pamphlet Laws 758) . . ."

There is no evidence in this case that chlorpromazine contains any of the drugs or drug derivatives listed in Sec-

tion (a) of the statute, nor is there any evidence that the Secretary of Health has designated chlorpromazine as a dangerous drug. Further, there is no evidence that chlorpromazine is not safe for use except under the supervision of a practitioner licensed by law because of its toxicity or other potentiality for harmful effects of the method of its use.

Petitioner's witness, Dr. Staples, testified that the side effect as he observed it in Mrs. Jackson indicated a toxic reaction. This testimony is the origin of the statement appearing from time to time in plaintiff's brief to the effect that Mrs. Jackson was "poisoned" by the drug. The entire context of Dr. Staples' testimony on this point is as follows:

> "Q. (by Mr. Turner) What is meant in the profession by that name, by that term?
>
> A. 'Toxic' actually means poison. It can apply to almost any substance that is taken into the body. Alcohol, for instance, would be toxic if it were injected in sufficient quantity. There are many chemical substances which can be toxic to the body.
>
> Q. (by Mr. Turner) Is the drug chlorpromazine known to have a toxic reaction?
>
> A. Yes. I would say that any drug can have a toxic reaction, including aspirin (N. T. 371)."

Petitioner repeatedly states that chlorpormazine can kill. It is true that there is such testimony in the record, but it has been taken completely out of context. The origin of Petitioner's argument that chlorpromazine can be fatal is the testimony of Dr. Wright, which is as follows:

> "Q. (by Mr. Turner) From your knowledge of this drug chlorpromazine, it is a drug, is it not?
>
> A. Yes, sir.
>
> Q. And as such it can kill, can it not?
>
> A. There have been some suicides by chlorpromazine where people have taken exceedingly large

doses; however, of five cases that attempted suicide, that took exceedingly large doses, all recovered without injury.

Q. That is not my question, Doctor, not whether they had committed suicide. Can the drug itself—it is true I mean, that the drug itself can in instances kill an individual?

• • •

A. I would have to answer 'yes', because any drug can kill (N. T. 421)."

It is submitted that the testimony of Dr. Staples in its entirety will not support the inference made by Petitioner that chlorpromazine poisoned Mrs. Jackson, and that the entire context of Dr. Wright's testimony does not support Petitioner's inference that chlorpromazine is a fatal drug.

The provisions of the Food, Drug and Cosmetic Act, 21 U. S. C. A. 353, are very similar to those contained in the Pennsylvania statute. However, it also contains a provision in subsection (b)(1)(C) whereby a new drug application may limit the use of a drug to a licensed practitioner.

The new drug application for chlorpromazine, which became effective on April 26, 1954, is not in evidence. It is, therefore, impossible to ascertain what limitation there may be, if any, to the *use* of chlorpromazine by the terms of that application. The only indication of any limitation in the Department of Health, Education and Welfare letter offered by Petitioner into evidence at the time of trial is that there was limitation on the *sale* of the drug to a physician's prescription, again pointing out the intent of the statute which is to protect misinformed out-patients from the hazards of mislabeling, misbranding and adulteration when purchasing drugs.

II. There Is No Conflict of Decisions.

In Pennsylvania, there is a presumption against the negligence of physician treating a patient: *De Rose v. Hirst*, 282 Pa. 292, 127 A. 776 (1925). The duty imposed by law

on physicians in treatment of their patients is to employ such reasonable skill and diligence as is ordinarily exercised in their profession, giving due regard to the advanced state of the profession at the time of the treatment. *Powell v. Risser*, 375 Pa. 60, 99 A. 2d 454 (1953). The burden of proof which Petitioner must carry is that he must show that this standard has been violated and that an injury resulted thereby. Petitioner is required to offer expert testimony in support of his case. The only exception to this rule is where the common knowledge and experience of laymen would be sufficient to warrant their passing of judgment on the actions by the physician. *Demchuk v. Bralow*, 404 Pa. 100, 170 A. 2d 868 (1961).

There is no testimony in this case which establishes or which tends to prove that any of the doctors at Embreeville State Hospital did anything which was not in accordance with the standard of the medical profession. There is no medical testimony that Mrs. Jackson received too much chlorpromazine or that she received it over too long a period. On the contrary, the only evidence on this point in the case is that the administration of chlorpromazine to Mrs. Jackson was in accordance with the standard of the medical profession (154a, 7b). Mrs. Jackson received a maximum of 300 mg. of chlorpromazine a day (P-1-C). This amount of chlorpromazine is well within the approved dosage (6b, 161a).

Petitioner has miscited *Demchuk v. Bralow* as attacking the rule requiring expert testimony, when in fact the dissent in that case merely argues that when the surgeon admits that he punctured the wall of plaintiff's esophagus during the course of a surgical procedure, that this is sufficient to come within the exception to the rule. The only evidence at the trial of this case as stated above was that in fact the treatment given to Mrs. Jackson was in accordance with the standard of the medical profession so that what Petitioner asks the Court to do here is not only to find fault with a previously unchallenged rule but also to

disregard the only positive testimony in the case on this point which is in favor of Respondents.

The decisional rule requiring expert testimony is a solidly grounded rule of evidence, well established in Pennsylvania and indeed throughout the state courts. It is not in conflict with any federal rule of law.

III. The Trial Judge Acted in Accordance With the Law and Rules of Procedure.

Judge Luongo's admonition to Mr. Jackson during the course of the second trial in order to allow able counsel to proceed with the case was entirely proper. At no point during either trial of this case did Mr. Jackson appear as a plaintiff of record or counsel of record; *Arrington v. Robertson*, 114 F. 2d 821, is thus clearly distinguished. As noted by Judge Luongo in his Opinion, Mr. Jackson was in constant consultation with counsel throughout both trials. At the trial of the first case, when Judge Luongo was considering the Motion of Mr. Jackson for a mistrial, Judge Luongo made a condition of the granting of that Motion, that the case should come to trial the following month. The following month, Mr. Jackson made an application to the Calendar Judge for a further continuance of the matter, and the Calendar Judge in his discretion refused that application. In fact the second trial of this matter did not begin until some two months after the abortive first trial. As the Trial Judge stated in his opinion denying plaintiff's application for a new trial, "Decedent's husband apparently did all of the trial preparation. He had every fact, every record, every detail at his fingertips. Having prepared the case so thoroughly, he was in a position to brief new trial counsel quickly and thoroughly. Under such circumstances, a period of two months was ample time for counsel to prepare for trial. The excellent manner in which the case was tried belies the charge that plaintiff's case was prejudiced in any way by insufficient

time for counsel to prepare for trial" (71a). The admonition given to Mr. Jackson during the course of the trial to refrain from continuous delaying conferences (137a, 138a) is certainly within the discretion of the Trial Judge to maintain decorum in the courtroom.

IV. The Remaining Contentions of the Petitioner Are Without Merit.

Respondent will not reply to those allegations based on affidavits filed subsequent to the trial of the case covering mainly conversations between Mr. Jackson and other people. Likewise, no reference will be made to the contentions based on testimony in discovery depositions, which testimony was not offered in evidence at the trial.

The charge of the Court was full and fair. In an excess of consideration for the Petitioner, Judge Luongo gave in the charge considerably more than that to which Petitioner was entitled. Petitioner raised many objections to the Court's charge. It is submitted that these points represent only distortions, innuendoes, and inferences made by the Petitioner. As an example of Petitioner's Complaint, the following is quoted from page 31 of Petitioner's Brief in the Court of Appeals:

> "The Court cautioned the jury not to decide the case out of sympathy, pity or prejudice (38a, 40a). This implies sympathy or pity for the deceased or survivors and prejudice against doctors. He omitted the converse (40a)."

The foregoing quote sets the tenor of Petitioner's objections to the charge and the alleged errors in the conduct of the trial. It is submitted that there was no error in the trial of the case, in the charge, or any error whatever which would require review of the appellate court's disposition of this twice-tried case.

CONCLUSION.

It is submitted that the issues presented in this case are not properly the subject of review by the Supreme Court of the United States, in that there is no conflict in any of the decisional rules applied between the Third Circuit and any other Circuit; there is no conflict between federal or state statutes; no statute has been held to be unconstitutional; there is no peculiar importance to this case above and beyond the importance that any serious case has to the particular litigants and parties in interest; the subject in controversy is a non-federal matter; and finally, the decision was correct.

Respectfully submitted,

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REPLY BRIEF OF PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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MORTIMER W. H. COX, Administrator of the Estate of LEONA A. JACKSON, Deceased,

Petitioner

v.

ELEANORE R. WRIGHT, also known as ELEANORE R. HECKER,

Respondent

REPLY BRIEF OF PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

CORRECTIVE STATEMENT

Respondents' statement requires some correction.

1. Saying that Mrs. Jackson "had a history of mental and physical ills dating back to the 1940's" is like compressing into one sentence isolated instances of infelicity over a

long marriage to give the appearance of a continuous course of conduct required to make out a cause of divorce on indignities. On some occasions *years* before the delusions, Mrs. Jackson, for a matter of a minute or two, was apparently unable to move or speak on awakening in bed. I do not know whether it was catalepsy or not; it appeared to me what I supposed catalepsy looked like. Catalepsy is not a mental ill; and there was no evidence whatever of any mental ill until 1952; there was no evidence of any other physical ill until 1954 when diabetes appeared, of a very minimal nature, which was controlled by diet until 1957, never required more than 18 to 22 units of NPH 40 insulin a day until her death in December, 1961, and was under good control until then.

2. The record does not show that Mrs. Jackson was treated at Pennsylvania Hospital with chlorpromazine. A doctor, Draper, who happened to have an office in the Pennsylvania Hospital, *prescribed* for her. He gave her no drugs. I do not know that he prescribed chlorpromazine. The record shows this (R 3b). Line 21

3. The doctors who threw us on trial did say she had arteriosclerosis but this is to be doubted in view of what they did to us on the stand contrariwise to what they said in preparation. The swift, radical change in personality from which she never recovered belies arteriosclerosis. And we should not be bound by what they said *against* us because of the doctor v. doctor complex. Even if arteriosclerosis were present, the Court can take judicial notice that that does not render one "a senile dement or mentally incompetent": Olson v. Olson, 46 N. W. 2d 1, 11 (Iowa).

4. The same applies to: "she could not care for herself," "was irrational" and "communicated on a superficial basis," before Embreeville. I lived with her and my testimony shows she did most of the things a normal person would, except her judgment was affected and she at times thought people were "about" (R 75a-78a).

5. There is no "routine dose" of chlorpromazine. It is a drug which affects different persons in widely varying and highly individualized ways—so much so that one may be killed by 5 milligrams and another can take 4800 milligrams without adverse effect. That is why this particular drug is more highly dangerous than almost every other of the so-called tranquilizers.

6. Respondents persist in speaking of "treating physicians." Two prescribers were totally unlicensed; one was licensed in North Carolina; all were mere trainees. None was permitted to prescribe CPZ in Pennsylvania. Even the training permission for Mainero had expired when she prescribed three times in July! (Ex. P-1-C, R 7a; P-3, R 19a).

7. Stahlnecker testified that in his opinion there *was* an overdosage, not merely that there *might* have been (R 135a). Lines 7

8. Stahlnecker's testimony: My undenied affidavit in support of motion for new trials (R 61-66a) is a complete answer to Stahlnecker's statement that I "tried to make him say" chlorpromazine caused Mrs. Jackson's condition. Yes, I had numbers of conferences with him, but, at every one of them I repeatedly told him that I sought from him nothing but his own true opinion.

ARGUMENT

I. THE APPLICATION OF THE DECISIONAL RULE THAT EXPERT TESTIMONY IS NECESSARY TO SHOW NEGLIGENCE IN A DOCTOR'S PROFESSIONAL ACTS CONSTITUTED A DEPRIVATION OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS AND A JURY TRIAL.

Although respondents acknowledge that these are the questions presented, they do not discuss the issues but proceed at once to try to submerge them by semantics involving "use," "toxic," "poison." They have avoided this question as if it were the poison which chlorpromazine is.

This question cannot be so submerged.

There are 296,000 lawyers in this country. Ask any of them who are in either general or negligence practice (and a fair guess would be one-fourth, 74,000) what they tell their clients who come to them with medical malpractice cases. If it is anything less than sawing off the wrong leg or leaving an assortment of implements inside the belly, the answer is "You have to have expert testimony, and you can't get a doctor to testify against another doctor." After I had put this squarely before the Court of Appeals, Judge McLaughlin asked Mr. Beasley, "What about the constitutional question?" Mr. Beasley (a negligence specialist) answered, "I handle a good many malpractice cases and *what Mr. Jackson says is true.*" "But," he says, "this is a common law action and the Supreme Court of Pennsylvania can wipe it out." This might be, generally, *but no supreme court and no legislature has the constitutional power to wipe out a cause of action, recognized by the law* (as Pennsylvania recognizes a malpractice cause of action), AFTER *the cause of action has* ACCRUED, by the requirement of evidence which is unattainable. An existing cause of action is a well recognized species of property protected by the Constitution. Nor can the state, through its arm, the judiciary, constitutionally impose on the remedy (the right of action) any unreasonable burden. Since the type of evi-

dence—expert testimony—(and this means, in practical experience, by a doctor) is known by everyone, as even the defense admits, to be unavailable, the application of the decisional rule, putting the burden on petitioner to supply that kind of testimony, in effect destroys his cause which the Fourteenth Amendment protects and which the state may not take away without the provision of another adequate remedy. Pennsylvania has not provided any other remedy.

Judge Carroll has accurately appraised the situation in Demchuk v. Bralow, 404 Pa. 100, 117, 170 A. 2d 868 (spurned by respondents), where he says:

> "I want to say this by way of conclusion, because this record may go to the Supreme Court, my feeling about the Robinson-Wirts case is this: I think it constitutes an unwarranted extension of protection to the physician, absolutely unwarranted, and this case establishes that fact. Certainly, it seems to me if the effect of a doctor's diagnosis or his treatment is in issue, a lay jury is not competent without expert testimony to pass on medical propriety, and you can't get medical testimony in any part of this great big wide world, and the time has come, and what I have said here may help accelerate that time, that the law will be so formed as to permit the testimony of persons not particularly skilled in medical practice, but people with common sense, and conclusions will be permitted to be drawn from the presumptions that arise in cases of this kind. As of this moment, a lay jury is not competent to pass upon medical propriety, and that is the Robinson case in a nutshell.
>
> "However, let me say that where care is exercised by a doctor in effecting an otherwise proper treatment, when that is at issue, the use of care by the doctor, it should present a jury question. However, the Robinson-Wirts case says it does not, and again I say it isn't for this court to arrogate to itself the

authority to disrupt the existing law of Pennsylvania, with which I am, however, definitely out of accord.

"Therefore, I am going to grant a nonsuit. If the Supreme Court reverses me, as I hope it will in this case, I would be very much happier than if they affirmed what I have done here this morning."

Two states have seen the light and, by statute, have by-passed the impossible decisional rule by permitting the use of text books to show the matters which the application of the rule here operated to prevent: Mass. Gen. Laws C. 233, §79c (1949). Nev. Rev. St. 1957, §51.040.

All along the line any discussion of these constitutional questions has been avoided. Judge Luongo says (R.73a), ". . . plaintiff now asks this Court to disregard that requirement of Pennsylvania law [requirement of expert testimony to establish injury to decedent]. *Of course I may not.*" If petitioner's position, that the decisional rule requiring expert testimony is unconstitutional, is correct (and this applies equally whether the supposedly required expert testimony is on injury, causation or negligence, because it involves in each instance doctor v. doctor), *then of course* Judge Luongo not only "may" disregard that "requirement" but his oath of office requires him to disregard it.

The Court of Appeals does not even *hint* at the constitutional questions in a 7-line opinion.

My last hope is that this Court will deal with these questions and I am most hopeful of the result if it will do so.

Respondents dismiss the affidavits (R 61-6a) as "covering mainly conversations between Mr. Jackson and other people." These affidavits, permissible under the Rules of Civil Procedure (59c) and undenied, set forth what Staples and Stahlnecker told me on causation, in preparation for trial, and were proper as going to establish the constitutional propositions here asserted. In vein similar to that of the suggestion in the TV commercial, "Tell the lawyer the truth in preparation, but give him *nothing* on the stand."

The averments in the affidavits about Gottlieb and Winkelman further reinforce the ancient refrain, "You can't get a doctor."

The affidavits were necessary because the cases now have *built-in proof* of what is happening throughout this country as a result of application of this unconstitutional and unconscionable rule. With a population of 193.000,000 people there must be 50,000 prospective malpractice actions a year which are stifled by this rule. That is an average of about one case in 16 months for each general practitioner or negligence specialist in which he has to tell his client, "You can't prove your case."

See, on the Conspiracy of Silence, Trial of Medical Malpractice Cases (Louisell and Williams, §14.01 et seq., p. 418 et seq.).

The whole case is explicable by what Dr. Winkelman said in refusing to be an expert witness: "I wouldn't want to do anything which would make me a social outcast." A doctor won't testify against another doctor defendant where injury, cause or negligence of the other doctor is in question.

This case is broader than the tragic wrong which was done Mrs. Jackson. The principle which this Court is asked to enunciate is of grave importance to every person in this country. Remove the blindfold from the Lady's eyes so that she may see the shackles which bind a plaintiff in a malpractice action to the point at which the remedy becomes a will of the wisp.

II. Refusal of Adequate Time for Preparation and Exclusion From Participation in Trial Constituted a Denial of Due Process and a Trial by Jury.

Respondents now suggest that realities be ignored.

I was the surviving husband of Mrs. Jackson, who died intestate. There was and is no other person as to whom all of the following could truly be said: He knew Mrs. Jackson best, he observed at first hand what the drug did to her, he knew something about the drug and its capabilities, he was

a lawyer of almost 40 years who had some reasonable concept of how a case should not be tried, he had talks with defendants about Mrs. Jackson's condition, he talked with plaintiff's doctor witnesses and knew what they had said in preparation.

It is true, as respondents say, I was not formally plaintiff of record, I was not formally counsel of record. But it is also true that I was treated throughout the case, by Judge and respondents, as the real party in interest and as counsel in the case. The record shows this in ten different places. Three examples will suffice:

A. Mr. Beasley, at the hearing before Doty, J., on January 7, 1963: "This case was on trial for two days when the *plaintiff, the real party in interest, a Mr. Jackson,* discharged his attorney. . . . Judge Luongo instructed *Mr. Jackson, who was the real plaintiff in the case. . . . Mr. Jackson is the real party in interest*" (p. 2, line 12; p. 3, lines 14, 19).

B. Judge Luongo's opinion: "Decedent's husband apparently did all of the trial preparation" (R 70a).

C. Hearing on September 25, 1963, to correct record: "Jackson: *The Court considered me as a real party in interest* and I think properly so." The Court: (Judge Luongo) *"No question about that"* (p. 19, line 11).

It seems somewhat late in the case and inconsistent with respondents' prior position to try to avoid what appears as a basic error of the Trial Judge, and in itself lack of due process, in excluding from participation in the case one considered as a party in interest and counsel.

I made the motion for the withdrawal of a juror only after counsel at the first trial, although he had earlier agreed, refused to do so.

The motion was made because prior counsel had called *as our* witnesses, de Schut, (Mainero) de Schut, the very two unlicensed *students* who, although forbidden by law, prescribed for Mrs. Jackson this deadly drug (which was

administered to her under those prescriptions) and Dr. Harris, their immediate superior. They were *all actually hostile* because their leanings were naturally toward defendant doctors, their former superiors.

By the examination of de Schut and de Schut, *on technical medical matters*, diabetes, etc., counsel automatically qualified them (mere trainees in psychiatry), as plaintiff's *expert witnesses* so that when they were turned over to defense for cross-examination they gleefully absolved the drug as a cause of the injury.

At this point, before I had even taken the stand to testify to the facts, the case was lost beyond recall and I knew that if a juror were not withdrawn and the cause continued there would be no possible chance. Counsel was sick. He had diabetes, cardiac insufficiency, high blood pressure and stomach ulcers, the result of which showed clearly, unfortunately, in the trial, and his handling of the case conclusively demonstrated it. (This appears of record in the first trial.) The Judge and every lawyer in the Courtroom knew what was happening.

The fact is that a juror was withdrawn and the cause was continued and once that was done, the refusal to allow sufficient time for succeeding counsel to prepare was itself a denial of due process. There were papers, documents, memoranda, 1004 pages of pretrial discovery and notes of the first trial, statements of witnesses, witnesses to interview, study of the drug, etc., etc., etc., a pile 3 feet high to go over. Mr. Turner had six weeks after he was able to get to the case. And although he devoted much time to the preparation, he could not do so to the exclusion of his other practice; the time was too short; it could not be done. Mr. Turner did as well as anyone (better than many would have done) with the case within the limited time, but it was impossible. It is no reflection on Mr. Turner to say that if we are so fortunate as to have this Court see that due process requires a new trial, the record will be without the mutilation which inevitably resulted from lack of time.

Respondents should not be heard to criticize this as a ground for application here because it was they who forced us on to the second trial before succeeding counsel could adequately prepare.

Judge Luongo could not have known whether the case was "excellently tried" for he could not know what was not produced before him.

"*Constant* consultation" is a broad generality, and, like most generalities, an exaggeration, or we would not be here. It is true that I was in frequent consultation with counsel at the first trial because I would have had to be an idiot to sit quietly without seeing what was being done to the case in making hostile witnesses our own experts so that they could demolish our case on cross-examination. I was in frequent consultation with Mr. Turner on the second trial because he had not been able to encompass the mass of material in the case. Through no fault of his, the presentation was superficial and I was trying desperately to compensate for the court's denial of sufficient time. To be charged with obstruction and directed to let Mr. Turner alone, when the fault was with the Trial Judge in failing to allow time for preparation, is too much. It is not reasonable to suppose that any judge can know how well a case is tried if he does not know how much was left out due to lack of preparation. There was no disruption whatever of decorum. Judge Luongo's use of the term "belies" is pretty harsh, completely unjustified under the facts and illustrates how even a judge can operate on superficial appearances and completely ignore what was not introduced and therefore what he could not possibly have known should have been put into plaintiff's case.

If it be thought that two trials, or one trial and an aborted trial, are sufficient, I can say only that, if substantial errors, including a grave constitutional one, were made, both prior attempts are as if they had never taken place.

And it is only a bootstrap lifting device to say that the withdrawal of a juror and the continuance were granted

on condition that the trial be held the following month. If the withdrawal was warranted, and we may be sure that Judge Luongo would not have allowed it if it had not been warranted, then the imposition of an unreasonable condition (too short a time) merely compounded the situation.

One critically damaging effect of the lack of time to prepare was counsel's improvident withdrawal of the Philadelphia Psychiatric Hospital Nurses' Notes (which he had never seen before) which would have shown the unending utter confusion. This would have been strong evidence of causation which respondents contend was missing. The Trial Judge indicated a rejection of them without even seeing them (R 159a; Ex. P-9).

III. The Federal and Pennsylvania Acts Relating to Dangerous Drugs Are Applicable.

Respondents dispute the effect of the Pennsylvania Dangerous Drug Act of 1955 (App. C 20-21). It specifically provides that any drug is "dangerous" which is limited by the federal act to use "under the professional supervision of a practitioner licensed by law to administer such drug," and shall not be dispensed except on the prescription of a *Pennsylvania licensed physician.* The federal act (App. C 19) provides that any drug which is so limited, by an effective application under the act, may be dispensed only upon the prescription of a licensed practitioner. Exhibit P-2 (R 15b) shows that the effective application of the maker of chlorpromazine limited the sale of the drug to a licensed doctor's prescription. If it cannot be lawfully *sold or dispensed* without a licensed doctor's prescription it certainly cannot be *used* without a licensed doctor's prescription; a prescription, by definition, relates to the *use* of a drug. What reason could there be for restriction of the *sale* of chlorpromazine to a licensed doctor's prescription if it did not have "a potentiality for harmful effect"? (The reference to the Act of July 11, 1917, is not pertinent here since chlorpromazine was not produced until 1952).

The record is devoid of any evidence whatever that either de Schut or (Mainero) de Schut was "qualified . . . to practice medicine in their own countries," as respondents state, or had any license anywhere. The testimony as to their training was therefore completely irrelevant and improper; and it would have made no difference if they had been licensed *anywhere* outside of Pennsylvania. The reason is a simple one: Pennsylvania, prescribing and therefore knowing its own educational, interneship and licensing requirements, recognizes its own licensees as competent to prescribe a dangerous drug, but will not assume the burden of overseeing the educational, interneship and licensing requirements of 49 other states and 100 countries to determine whether other licensees are competent to prescribe dangerous drugs. The public policy of Pennsylvania thus statutorily declares the incompetence of anyone, *not a Pennsylvania licensee*, to prescribe such a drug.

The federal act (App. C 20) makes admissible any document certified as a part of the records of the FDA. Exhibit P-2 comprised not only the copy of the letter (R 15b), but also the certification under the seal of the Secretary of Health, Education and Welfare in accordance with the act. This certification and copy of the letter were admitted when the defense withdrew objection (T 87).

To reach a conclusion, as respondents do, that the Pennsylvania act of 1955 is merely a mislabelling, misbranding or adulteration act, one must completely discard the express terms of the act which prohibit the dispensing of a dangerous drug except on the prescription of a Pennsylvania licensed doctor (App. C 20-21). There is no basis for guessing that the acts were for protection of outpatients only.

In any event all of respondents' play on words seems fatuous. There is no mystery about chlorpromazine; it is a drug known throughout the world; it is a many, perhaps a hundred, million dollar business; it is one of the most, if not the most, powerful of the tranquilizers.

Everyone, including respondents, knows that no tranquilizer can lawfully be sold, dispensed or used, except on a doctor's prescription. Let anyone try to obtain for use chlorpromazine (Thorazine), meprobamate (Equanil), or rauwolfia serpentina (Reserpine) without a prescription.

Senator Humphrey estimates that there have been 13,000 medical articles *on this one drug alone*; literally hundreds of them warn of its dangers. They are published in the medical journals in English, Arabic, Abyssinian, Bulgarian, Chinese, Czechoslovakian, Danish, Dutch, French, German, Greek, Hebrew, Hungarian, Italian, Japanese, Norwegian, Persian, Polish, Portuguese, Romanian, Russian, Turkish, Yugoslavian, and no doubt other languages. The drug has caused hundreds of deaths reported in the scientific journals; two hours in a medical library with references from Index Medicus and its predecessor would give any intelligent person some comprehension of its commonly-known dangers. The well-known and most significant effect of the drug is *hypotension*. The drug causes the arteries to dilate, thus *reducing blood pressure* (hypotension). This results in anoxia (deficiency of oxygen), because *less* oxygen-carrying blood reaches the brain. The brain cells are damaged if they are deprived of sufficient oxygen for even a very few minutes, 1 to 3 or 4, or a little longer, depending on certain other contents of the blood.

Damaged brain cells, unlike other body cells, are not repaired, regenerated, or replaced; once damaged, they remain so. One effect of damage to the brain cells by the drug is confusion such as was produced in Mrs. Jackson. Winkelman, one of the original experimenters with chlorpromazine for Smith, Kline and French, makers of the drug, clearly stated that this is what happened to Mrs. Jackson (R 63a-64a). Further, if, in fact, Mrs. Jackson was affected with arteriosclerosis, which may be doubted, a fortiori should this drug *not* have been used for it is much more likely to cause damage to brain cells already receiving less than a full supply of blood.

IV. The Drug Was a Causative Factor.

Respondents urge that there was no evidence that Mrs. Jackson was poisoned by chlorpromazine and that what was said was "taken out of context"; they use the euphemistic term "reaction." Staples was asked, "Q. Doctor, from your knowledge did the condition as you have observed it there relate or appear to you to be a toxic condition? A. Yes, it did. Q. Doctor, did you have any difficulty in forming your opinion at that time? A. No, I did not" (R 142a). Line 13 "Q. Doctor, in your opinion, was the condition in Mrs. Jackson as you observed it on July 31, 1957, what is known as a toxic condition? A. Yes, it was" (R 149a). Line 26

If this does not mean that she had been poisoned by the drug then I guess I need more instruction from the lexicographers and grammarians. Respondents appear to equate "toxic" with "fatal." Although, as noted above, chlorpromazine is a killer, "poisoned" does not necessarily mean "killed by poison."

There is a presumption of continuance of the causation of confusion, *by the drug*, once shown, until the contrary is shown. This is sufficient to get to the jury on causation.

I believe injury, causation and negligence were shown, but, admitting arguendo, that any or all were not shown, then the complete answer and full excuse is the application by the Trial Judge of the unconstitutional rule which, by over-burdening the remedy, prevented such showing and thus effectively destroyed the cause of action itself. In any event, the jury, under erroneous instructions, never had a fair chance to pass on causation.

V. The Tenor of the Charge.

The tenor of the charge can best be obtained by reading it to see that it refers to every scrap of *evidence* favorable to respondents as *facts*, but refers to the only *two* items *which the judge mentions* which are favorable to petitioner.

not as facts but: "You have heard that the drug *may* have caused toxic confusion" and "*possible* side effects the drug *may* have had" (R 42a, lines 29-34).

VI. Conclusion.

It is believed that the application of the Pennsylvania decisional rule that expert testimony is required to show negligence in a doctor as related to his acts in a professional way operated to deprive petitioner of due process, the equal protection of the laws and a jury trial, that refusal of sufficient time to succeeding counsel for preparation for retrial was a denial of due process, that the Federal and Pennsylvania acts relating to dangerous drugs govern, that if causation, injury and negligence were not shown, the application of the decisional rule prevented showing them, that the principles here presented are of wide application and that a certiorari should issue.

Robert F. Jackson,
Attorney for Petitioner.

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IN THE

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October Term, 1964

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Respondent

PETITION FOR REHEARING

Sur Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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PETITION FOR REHEARING

To the Honorable the Justices of the said Court:

The petition of MORTIMER W. H. COX respectfully represents that:

1. These cases involved permanent brain damage done to the Wife of the undersigned writer of this petition, resulting from prolonged over-administration of a drug upon prescriptions by unlicensed persons who were under the supervision of defendant doctors and who were prohibited by law to prescribe the drug.

2. By order, on October 12, 1964, this Court refused to grant the writ of certiorari prayed for in this cause.

3. The petition for certiorari herein (a) raised the question of the unconstitutionality of the Pennsylvania decisional rule of evidence which presumes to require so-called expert medical testimony to show negligence of a doctor in the way of his professional acts where injury results to a person under his care, in that the rule denies due process, equal protection and trial by jury, and (b) asserted that the rule, which was here applied, for all practical purposes cloaks the entire medical profession with an effective immunity denied to all other persons and therefore imposes a correspondingly unreasonable burden on a plaintiff's remedy because of the practical impossibility of obtaining doctor against doctor evidence.

4. The result of the writer's research indicates that the rule mentioned in paragraph 3 hereof, which was applied in this cause, is also applied in all but two states (in which statutes have abrogated it) and, since the federal courts follow the law as announced by the state courts, it seems unlikely that divergent decisions in federal Courts of Appeal will be rendered.

WHEREFORE your petitioner prays that this Court grant a rehearing.

AND he will ever pray &c.

ROBERT F. JACKSON
Attorney for Petitioner

Pursuant to Rule 58, I hereby certify that the foregoing petition is presented in good faith and not for delay and is restricted to the grounds specified in the rule, the ground stated in paragraph 4 hereof not having been presented originally.

ROBERT F. JACKSON
Attorney for Petitioner